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Supreme Court, U.S.
FILED
FEB 24 2009
OFFICE OF THE CLERK

No. 08-824

IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. PIETRANGELO, II,

Petitioner,

v.

ROBERT M. GATES, Secretary of Defense; MICHAEL CHERTOFF, Secretary of Homeland Security; UNITED STATES,

Respondents.

PETITIONER'S REPLY TO *OPPOSITION TO PETITIONER'S MOTION TO STRIKE*; MOTION FOR LEAVE TO FILE REPLY

Petitioner James E. Pietrangelo, II ("Petitioner") hereby replies to the *Opposition to Petitioner's Motion to Strike* filed by the Cook plaintiffs on or about February 17, 2009.

Petitioner's "End-Run" Argument *Is* Correct; And The Cook Plaintiffs Were Not Parties to the Proceeding Below

While Petitioner cannot count himself among regular practitioners before this Court, like counsel for the Cook plaintiffs apparently can, he can count himself among litigators who take seriously their ethical obligations, including those requiring having a legal basis for making a submission to a court. Prior to filing his *Motion to Strike*, Petitioner did two specific things, among others. First, prior to filing his *Petition for Certiorari*, he personally spoke with the Supreme Court Clerk's office regarding whether he had to, as a matter of basic form under Rule 14.1 (b), list the Cook plaintiffs on/in the *Petition* as "parties to the proceeding in the court whose judgment is sought to be reviewed," more commonly known as "parties to the proceeding below." Petitioner did

not want his *Petition* to be rejected out of hand by the Clerk's office for lack of denomination of proper parties, forcing Petitioner to then correct and reprint the *Petition* at his great cost. Petitioner articulated to the Clerk's office his understanding that the Cook plaintiffs were not "parties to the proceeding below" because the relevant proceeding below was Petitioner's own separate appeal in which he alone was an appellant; Petitioner then asked the Clerk's office if his *Petition* would be rejected as not complying with Rule 14.1 (b) if it did not list the Cook plaintiffs as parties to the proceeding below based on his articulated belief. The Clerk's office told him that his *Petition* would not be so rejected. Based on this, Petitioner concluded that the Cook plaintiffs were not "parties to the proceeding below."

Second, prior to filing his *Motion to Strike*, Petitioner consulted the ninth edition of *Supreme Court Practice* on the subject of whether a losing party below, who may file a petition for certiorari but chooses not to, may be a respondent *opposing certiorari*. The practice guide—in the same so-called four-page section which Cook plaintiffs cite to in their *Opposition*—did not cite or seemingly did not cite any case in which this Court has spoken definitively on who can and cannot be a Rule 12.6 respondent and how; instead, the guide only cited, by example, a meager six cases in which non-petitioners were respondents. See Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop, Edward A. Hartnett, *Supreme Court Practice* (9th ed. 2007) at 437-438. Of the meager six cases cited by the practice guide, all but one involve respondents who *supported* certiorari for the actual petitioner.[1] See *id.* As for the one remaining case,

[1] Thus is false Cook plaintiffs' assertion (*Opposition* at 2) that "[t]he practice Mr. Pietrangelo decries is in fact so well established that a four-page section of the leading treatise on Supreme Court practice is devoted to this situation and some variants."

Prestige Lincoln-Mercury, Inc. v. Quality Mercury, Inc., *cert. denied*, 433 U.S. 914 (1977), certiorari was denied, mooting the issue of respondency. Moreover, the practice guide merely described this one case as a case in which "a party on the same side below as the petitioner in the Supreme Court opposed the petition for certiorari." See *Supreme Court Practice* at 437 fn. 73. There was no indication whether the party in question still supported the *claims* or completely aligned with the *claims* of the petitioning party *at the time of petition*. However, it is unlikely that the party did completely align with the claims of the petitioning party at the time of petition, because Prestige involved two competing car dealerships and their common distributor and their common manufacturer. See Quality Mercury, Inc. v. Ford Motor Co., 542 F.2d 466 (8th Cir. 1976), *cert. denied, sub nom.* Prestige Lincoln-Mercury, Inc. v. Quality Mercury, Inc., 433 U.S. 914 (1977). By definition, each party had to have had a slightly divergent position. In contrast, the Cook plaintiffs completely align with Petitioner's claims, yet the Cook plaintiffs oppose certiorari. Thus, Petitioner described, and rightly described, the Cook plaintiffs' taking a position as respondents—when they were not parties to Petitioner's separate appeal and when they *completely* aligned with Petitioner's *claims* and could have filed their own petition, and would have but for their dislike of the current make-up[2] of the Court—as "unheard of."

The cases cited (*Opposition* at 3-4) by the Cook plaintiffs do not change this conclusion. All of these cases not coincidentally involve the Executive Branch and its administration of a federal program or a resource. This Court has always given special

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[2] The Cook plaintiffs' new counsel described (*Opposition* at 2 fn. 1) part of Petitioner's *Motion* as "inaccurate," but provided no details, and Petitioner stands by his *Motion* as accurate.

leeway to the federal government as a co-equal branch of government. Moreover, federal programs such as environmental enforcement are by definition extremely complex, interconnected, and long-term. In turn, by definition a federal-program party is never completely aligned with the claims/defenses of another party. Thus, it makes sense for this Court to allow the federal government as a losing party below to be a respondent *opposing certiorari*. However, the eleven Cook plaintiffs are not the federal government. Additionally, they completely align with the claims of Petitioner. Indeed, they have pressed the same *exact* claims as he throughout this litigation, and even now before this Court.

It simply is unfair and inefficient to allow a party, who has made the decision not to seek certiorari, to later seek to submit argument to the Court on a subject on the back of another party. Indeed, if the Court allows the Cook plaintiffs to file as respondents, it will be as if they were petitioners—minus having had to pay the filing fee and to meet the deadline in their own separate appeal. Why should Petitioner have to pay the filing fee in this Court and the cost of printing a petition and appendix, and have to meet the filing deadline, but not the Cook plaintiffs? The Cook plaintiffs are simply making an end-run around the Rules.

Thus, the Cook plaintiffs' *Brief* should be stricken, and any future intended brief by them prohibited. Any future brief by the Cook plaintiffs' former counsel should also be prohibited, since the former counsel have no standing as to Petitioner's *Petition*, and the former counsel are also ethically prohibited from opposing, or otherwise taking an adverse position to, that *Petition*.

Because the Rules of this Court do not explicitly provide for a reply, Petitioner hereby moves for leave to file this *Reply*, on the grounds that it is necessary for a full explication of the matter.

February 23, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the United States of America that I served three copies of the foregoing *Reply/Motion* upon all parties required to be served, by on February 24, 2009, sending said copies first-class U.S. Mail to:

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Executed on February 24, 2009.

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